

Crest Tankers, Inc. and Radio Officers Union, District No. 3, NMEBA, AFL-CIO. Case 15-CA-8769

27 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 18 October 1983 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel submitted a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Crest Tankers, Inc., Clayton, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Additionally the Respondent asserts that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

The Respondent has attached to its brief a letter it received after the hearing from its employee Charouleau in support of its contention that it had hired Charouleau on 11 October 1982. The Respondent requests that this letter be entered into the record or, in the alternative, that the case be remanded to the judge for the purpose of taking Charouleau's testimony. We note that the proffered evidence is not in the form of a sworn affidavit and that the Respondent has not established the evidence was newly discovered or previously unavailable. Accordingly, we deny the Respondent's request. Furthermore, the letter is ambiguous regarding the circumstances of Charouleau's hiring inasmuch as it refers to a phone call in November 1982 from the Respondent's Fleet Manager McHenry to confirm that Charouleau still wanted the job. Thus, even if the letter were considered, we would not find that it warrants a different result.

In sec. III.B.1. of his decision, the judge, in noting that McHenry did not call the Union's hiring hall for radio officers, attributes to McHenry the reason that he was working for a company with a "different philosophy." The record indicates, however, that it was the Union's attorney who asked McHenry if the reason he did not call the union hiring hall was because the Company had a different philosophy, and that McHenry responded that he did not know what the Company's philosophy was. In correcting this error we nevertheless find it insufficient to affect the results of our decision.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on November 2, 1982.¹ By Radio Officers Union, District No. 3 NMEBA, AFL-CIO (herein ROU or the Union). A complaint issued on December 22, and amendments thereto issued on March 31, 1983. As amended, the complaint alleges that Crest Tankers, Inc. (herein Respondent or Crest)² interrogated an employee concerning his union membership, told an employee that he would not be hired because of his union membership activities, said that Respondent would scrap its vessels if any of its employees joined a national union, and said to an employee that the Company would not be hiring any union personnel, all in violation of Section 8(a)(1) of the National Labor Relations Act (herein the Act). Further, the complaint alleges, Respondent refused to hire Frederick G. Andersen and John W. Tibbs on or about October 18 and 19, and continuing thereafter, because of their union activities, in violation of Section 8(a)(3) of the Act.

A hearing was conducted before me on these matters on June 8 and 9, 1983, in New Orleans, Louisiana. On the entire record, including briefs filed by the General Counsel, Respondent, and the Charging Party, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Missouri corporation, with offices and a place of business in Clayton, Missouri, where it is engaged in the operation of vessels used to transport petroleum products to various States and territories of the United States. Based on a projection of its operations since November 1, 1982, when Respondent commenced operations, it will derive gross revenues in excess of \$50,000 for transportation of freight from the States of North Carolina and/or Louisiana directly to points located outside said States. The pleadings establish and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings as amended at the hearing establish, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a wholly owned subsidiary of Apex Holding Company, which in turn is wholly owned by Apex Oil Company. Apex Holding Company also owns Apex Shipping, Inc., Clayton Tankers, and, until its recent dissolution, Apex Tankers Co. Apex Shipping

¹ All dates are in 1982 unless otherwise indicated.

² Respondent's name appears as amended at the hearing.

owns Trinidad Corporation. The record shows that Apex Holding Company, its subsidiaries, and Trinidad in most instances have the same officers and management. Apex Tankers and Crest had the same officers.

Apex Tankers was also engaged in the transportation of petroleum products, and its only vessel was the *S. S. Little Apex*. In 1980, a representation petition concerning Apex Tankers was filed by the Union's predecessor. The Acting Regional Director for Region 15 granted a motion to intervene by Apex Tankers Officers Association, based on a collective-bargaining agreement between the Association and the Employer. He then reversed his decision, on the ground that the presence of supervisors among the officers represented by the Association presented a clear and present danger of a conflict of interest which would interfere with the collective-bargaining process. Accordingly, the Regional Director found a unit of two radio officers to be appropriate. On the filing of the Employer's request for review, the Board affirmed the Regional Director's decision. *Apex Tankers Co.*, 257 NLRB 685 (1981). Thereafter, in September 1981, the ROU was certified as the bargaining representative of the radio officers on board the *Little Apex* (G.C. Exh. 13).

About February 1982, the *Little Apex* was transferred to the Trinidad fleet, whose employees are represented by national unions. The ship was scrapped in July 1982, and Apex Tankers was dissolved on September 27, 1982. Respondent had been formed about 2 weeks before, on September 15, 1982.

B. The Purchase and Staffing of Respondent's Ships— Summary of the Evidence

1. The initial staffing

The Company purchased three ships, two from Getty Oil Company and one from Gulf Oil Company. Crest assigned the staffing of the new ships to William McHenry, who had formerly worked for Trinidad as a port captain. He assumed the title of fleet manager with Respondent.³

McHenry started with Crest in September, about the time of the Company's formation. His plan was to hire five crews to man the three ships. This was one crew less than most companies would employ, but McHenry believed that he could set up a "cycling system" for vacations which would permit more economical operations. Accordingly, he testified that he planned to hire five radio officers.

One of the principal factual disputes in this case is whether McHenry actually did hire five radio officers prior to the time that Andersen and Tibbs, the officers on the Getty vessels, made application for employment with Crest. This is the principal reason advanced by the Company for its failure to hire them. Andersen and Tibbs were members of the ROU.

There is another factual dispute as to whether Andersen and Tibbs made oral applications on October 18 and 19, respectively. However, the parties stipulated that written applications for employment were received by

Crest from Tibbs on October 25, and from Andersen on November 2 (G.C. Exhs. 11, 12).

McHenry asserted that he asked Getty official Kevin Smart for a list of employees who were to be laid off. The fleet manager averred that Respondent did not want to hire employees away from Getty if the latter still intended to employ them on other ships. McHenry said that he received this list on September 28 (R. Exh. 2). However, there were no radio officers on it. McHenry contended that Smart told him about that time that none of Getty's radio officers was available for employment by Crest. However, in a later conversation according to McHenry, Smart told him that, although Andersen would be reassigned to another ship, Tibbs was "out of the union hall," and Getty had no obligation to him. The absence of Tibbs' name from the hiring list therefore cannot be explained on the ground that Getty intended to retain him.

McHenry asserted that he made "verbal commitments" to various individuals over the telephone, and that this constituted the hiring of radio officers. The fleet manager said that he hired Alvin Stevenson on September 28 in this manner. There is no document in evidence to confirm Stevenson's hiring, unlike other asserted hirings.

McHenry averred that he called a Leon Fitzgerald, in Nova Scotia. He first gave the date of this call as November 6, but then corrected it to October 6. Fitzgerald needed to get his Coast Guard qualifications "updated," and McHenry asserted that he made a "verbal commitment" to hire him. Later, however, he learned that Fitzgerald could not meet the qualifications.

McHenry did not call the union hiring hall for radio officers. The reason, he said, was that he was working for a company with a "different philosophy." However, he did place a call to a Joseph Collins, associated with other labor organizations. McHenry averred that Collins gave him the names of Samuel Torelli, Sophie Lerro, and Edward Charouleau. McHenry further stated that he called Torelli and Lerro on October 12, and made verbal commitments to hire them on that date. However, letters to Torelli and Lerro did not follow until 10 days later, on October 22. Both of them begin with identical sentences: "You recently indicated your interest in employment as a Radio Officer with Crest Tankers, Inc. I am pleased to extend to you this firm offer of employment and welcome you aboard" (G.C. Exhs. 4, 7). Lerro and Torelli sent telegraphic acceptances which were received by the Company on October 25 and 27, respectively (G.C. Exhs. 5, 8). There were no prior written communications with Torelli and Lerro, according to McHenry.

McHenry gave different dates when he allegedly offered Charouleau employment. He initially testified that he contacted Charouleau's wife on October 6, and learned that her husband was aboard a ship owned by Delta Shipping Co. Charouleau called on October 11, and McHenry offered him employment. Charouleau replied that he was not available immediately, and McHenry promised to put him on the "vacation cycle" starting in January 1983. However, on cross-examination, McHenry said that Charouleau was offered employment a month later, on November 11. The first document is a

³ The pleadings as amended establish that McHenry was a supervisor and an agent of Respondent within the meaning of the Act.

letter to Charouleau dated December 6, confirming his employment (G.C. Exh. 3). It included an application form which Charouleau completed and returned to the Company (G.C. Exh. 2).

McHenry asserted that he learned that Charouleau was a member of the Radio Officers Union from knowledge that he was employed by Delta and by reading a publication which listed the union status of various shipping companies. He said that he was curious about such matters. However, in the employment history section of Charouleau's application, Delta Shipping Company is not listed as a prior employer (G.C. Exh. 2).

Summing up his hiring prior to October 18, when he met Andersen, McHenry asserted that he had hired Stevenson, Torelli, Lerro, and Fitzgerald, and had made a commitment to put Charouleau on the first vacation cycle—a total of five radio officers. However, in an affidavit executed in December, McHenry averred that between the time he received the Getty hiring list (September 28) and October 18, he had "recruited, hired, or made an offer to four radio officers" (G.C. Exh. 14).

On October 14, Crest offered John Collins an opportunity to prove that the Crest Tankers Officers Association represented a majority of its officers (C.P. Exh. 6). The Company recognized the Association on October 18 according to McHenry, although it did not own a Getty ship until November 1, and had only one radio officer (Stevenson) on salary on October 1.

2. McHenry's visits to the New York Getty and the Delaware Getty

a. *The visit to the New York Getty October 18 and the conversation with Andersen*

The two ships being purchased from Getty by Crest were the New York Getty and the Delaware Getty. The acquisition date was projected as November 1. The New York Getty was docked in Port Allen, Louisiana, on October 18, and McHenry went aboard to interview prospective Crest employees. He had a conversation with Andersen, the radio officer on the ship. Andersen had been employed by Getty for about 13 years, and was assigned to the New York Getty in December 1980.

According to Andersen, he asked McHenry "what the status of the radio operators would be in regard to employment with Crest Tankers." McHenry asked him whether he was a member of the Radio Officers Union, and Andersen replied that he was. Andersen stated that McHenry replied that he could not talk to him about a job because he was in the ROU, that Crest did not want any "national union" in the Company, and that if one got into the Company "they would scrap those ships . . . just like what happened with the Little Apex." McHenry added that the owner of the Company said they "wanted to do their homework right [and] would have no repetition of what happened with the Little Apex."

Andersen acknowledged that he told McHenry that he had been with Getty for 13 years, and would like to stay with Getty. He testified that he had not yet made up his mind about employment with Crest on October 18.

According to McHenry, Andersen opened the conversation by asking, "What's my chances of getting a job

with Crest Tankers?" McHenry testified that he replied, "I'm sorry, all of our positions are filled. I've hired the five radio officers that I need." However, in a letter to a Board agent, McHenry wrote: "I informed Mr. Andersen that Crest had already hired four radio officers" (G.C. Exh. 15).

Andersen then said, in McHenry's version, "You know, I'm a member of the ROU." McHenry averred on direct examination that he replied that that did not make any difference, that he was only interested in staffing the ships, and that he had already hired a member of the ROU. However, on cross-examination, McHenry denied making the latter statement. He contended that Andersen said that "ROU lawyers are going to meet the ship" at the time of its acquisition by Crest. McHenry denied asking Andersen whether he was a member of the ROU, or telling him that the Company would not hire ROU officers, or that it would scrap the ships before doing so.

After the New York Getty was sold to Crest on November 1, Andersen was assigned to another Getty vessel. However, he stopped working for Getty in April 1983, because all the ships had been sold by then.

b. *McHenry's visit to the Delaware Getty, October 19*

Tibbs was hired by Getty from an ROU hiring hall, and went aboard the Delaware Getty on October 3. About 2 weeks later⁴ it was docked at St. Rose, Louisiana, and McHenry went aboard to interview crew members. This took place in the officers' lounge, and McHenry started with the officers. After the fleet manager had finished with the officers and started with the crew, Tibbs asserted, he stepped in line in front of one of the crew members, went in, and asked to speak to McHenry. The latter agreed, and a conversation took place. Tibbs asked whether they were going to keep the same radio officers and have a contract with the ROU. McHenry replied "No" to both questions, and said that they were not going to hire any union personnel and were going to be a nonunion company. Tibbs asked McHenry if he was aware that there was a contract with Getty concerning the ship, and McHenry replied that that was no concern to Crest.

And then, as Tibbs was "asking him more about the possibility of being hired," McHenry repeated that they "weren't hiring anybody affiliated with the Union." McHenry also contended that Crest had hired a full complement of radio officers. However, he pushed a piece of paper toward Tibbs, and said that he could apply "in a non-union capacity." Tibbs replied that he did not wish to do so, and ignored the paper. He testified that he wanted advice from ROU Executive Vice President Joseph M. Penot.

McHenry testified that he went aboard the Delaware Getty and interviewed about 15 crew members. However, he denied having any conversation with Tibbs. McHenry said that, as he was passing the radio officer's door, he saw the feet of someone lying on the bunk. Oth-

⁴ Tibbs gave the date as October 21. I conclude that it was October 19.

erwise, he contended that the first time he saw Tibbs was on the day of the hearing.

Richard Roane was a former Getty employee who became a boatswain (petty officer) with Crest, in charge of 12 men. He was a member of another labor organization with Getty. Roane testified that he was second in a line of unlicensed employees waiting in a hallway to see McHenry on the Delaware Getty. He saw the last officer come out from an interview with McHenry, but did not see Tibbs. However, after talking to McHenry, Roane went back to his quarters to get a letter of recommendation for McHenry, and was absent for 5 to 6 minutes. Thereafter, he went on deck near a gangway. Roane said that he did not know whether Tibbs talked with McHenry, and acknowledged that he "could have" done so.

Tibbs left the Delaware Getty about November 1, and did not return to employment with Getty.

3. The written applications

Tibbs sought the advice of union official Penot, who suggested that he submit a written application. Accordingly, on October 20, the date after Tibbs' asserted meeting with McHenry, Penot typed up an employment application for Tibbs, addressed to Crest (G.C. Exh. 12). As indicated, the parties stipulated that this letter was received by Crest on October 25. Penot said he thought that he sent a copy to ROU's office.

Andersen testified that he called his wife on October 28 from New Haven, Connecticut, and discussed his employment prospects. They knew that the New York Getty and the Delaware Getty were going to be sold, and that there was uncertainty regarding the future of the other Getty ships. ROU Executive Vice President Penot testified that it was widely known in the fall of 1982 that all the Getty ships were for sale. As indicated, Andersen's employment with Getty ended in April 1983 because all the ships had been sold.

Because of these factors, Andersen and his wife decided on October 28 that he should seek employment with Crest. Andersen then called the ROU office in Jersey City, New Jersey, and spoke to John Zotkowski, the Union's national secretary-treasurer. He asked for an application form, and was told that the Union had a form letter. Zotkowski came up to New Haven the same day with the letter, and Andersen signed it and dated it October 28. It is identical in language to the Tibbs letter (G.C. Exh. 11). Andersen gave the letter to Zotkowski for mailing. He also gave the union officer a pledge card, and promised to help organize the vessel for ROU.

Penot gave a different version of the Andersen application, and said that it was he who asked Andersen to apply for employment with Crest. This took place in Wilmington, North Carolina, on November 1, at the time of Crest's acquisition of the vessels from Getty. Penot said that he thought he drafted Andersen's letter, and that Andersen signed it in his presence. Asked to explain the October 28 date on Andersen's letter, Penot replied that he could only assume that it was a form given to Anderson from someone in the ROU office. He did not know who dated the letter, but insisted that he had a conversation with Andersen on November 1, outside the

gate of the Apex Terminal in Wilmington. He asked Andersen to try to get employment with Crest, to sign a pledge card, and to try to "assist the Union in trying to save the jobs."

As indicated, the parties stipulated the Andersen's written application was received by Crest on November 2.

4. Respondent's reaction to Andersen and Tibbs

On McHenry's return to his office following his visit to the Getty ships in Louisiana, he submitted a memorandum, dated October 21, to Crest executive Tom Cornwall giving McHenry's version of the Andersen conversation (R. Exh. 3).

On October 28, the Union sent Crest a telegram stating that it represented Andersen and Tibbs, and requesting recognition and bargaining (C.P. Exh. 2). As indicated above, the charge was filed on November 2. Thereafter, McHenry called Getty executive Kevin Smart to inquire about the status of Andersen and Tibbs. In a letter to a Board agent, McHenry averred that Smart told him that Andersen would be retained by Getty, but that "Tibbs was a temporary person obtained through the Radio Officers Union to serve on board the Delaware Getty for a limited time and was not considered available for employment by Crest." (G.C. Exh. 15). At the hearing, McHenry testified that Smart told him that Getty had "no obligation" to Tibbs because he came from the union hiring hall.

McHenry said that he did not see the Andersen and Tibbs applications until some time early in November. He averred that he was "shocked" to learn that Andersen wanted employment. He did not send either Andersen or Tibbs an application form because of the Company's receipt of the telegram from the ROU which, according to McHenry, "threatened various legal actions." Acting on instructions from "higher authority," he turned everything over to the Company's legal staff.

5. Continued staffing of the vessels

McHenry's alleged complement of "five" radio officers underwent a reduction almost as soon as it was completed. Lerro resigned on December 8, and McHenry had to establish "one more radio officer," according to his calculation. He testified that Lerro was replaced by Charouleau, whom he had originally planned to start in January on a vacation cycle. However, this still would have left one vacancy, even assuming the Company's figures.

In addition, Fitzgerald failed to update his qualifications, and McHenry learned this apparently in December. On December 13, the Company received an application from Samuel Margolis, and McHenry put him into Fitzgerald's slot. Margolis began work in January 1983. McHenry asserted that he did not consider Andersen or Tibbs for this position, because electronic repairs were needed on the ship, and someone from "ITT" assured him that Margolis was qualified. Of course, since McHenry had no application forms from Andersen or Tibbs, he did not know their qualifications.

In December, McHenry learned about Bruce Brannick, a radio officer, from John Collins. McHenry contacted Brannick, and received a resume. At the hearing on June 8, 1983, McHenry testified that Respondent had hired Brannick "just recently." In addition, according to McHenry, he asked Anthony DeSalvo, a radio officer, whether he would be interested in employment in the event Crest expanded its fleet, and DeSalvo replied affirmatively.

C. Factual Analysis

The contradictions in McHenry's testimony about the hiring of radio officers are apparent from the record. I do not credit his testimony that he offered Charouleau employment on October 11, because of his later testimony that it took place on November 11, and because the first document evidencing the hiring is McHenry's letter to Charouleau dated December 6. It is incredible that the Company would have waited almost 2 months to confirm an oral commitment if it needed radio officers as badly as McHenry asserted that it did. I conclude that the earliest date that McHenry made a verbal commitment to Charouleau, if at all, was November 11.

The alleged oral commitments to Lerro and Torelli on October 12 are also suspect, because the language of the October 22 letters to them appears to contain the first "firm" offers of employment, rather than confirmations of prior commitments. It is strange that there is no document evidencing Stevenson's employment. Finally, McHenry flatly contradicts himself on the number of radio officers to whom he had made oral commitments prior to October 18.

I conclude that McHenry did indeed plan to hire five radio officers to crew three ships, but that he had not hired or made verbal commitments to that number by October 18. Based in part on these contradictions, I do not consider McHenry to have been a reliable witness.

Similar contradictions appear in McHenry's version of his conversation with Andersen on October 18 aboard the New York Getty. Thus, although he testified that he told Andersen he had already hired five radio officers, he informed the Board that he told Andersen the number was four. McHenry also retracted his assertion that he told Andersen he had already hired a member of the ROU.

Andersen, on the other hand, was a believable witness. I credit his version of the October 18 conversation, and find that McHenry then told him that he could not talk to him about a job because he was in the ROU, that Crest did not want any national union in the Company, and would scrap the ships if this happened, just as it did with the *Little Apex*. As noted above, the *Little Apex* was scrapped by a company which had the same officers as Respondent. This fact adds verisimilitude to Andersen's otherwise credible testimony.

McHenry said that Andersen asked, "What's my chances of getting a job with Crest Tankers?" However, Andersen's version is less precise, and his other testimony clearly shows that he had not made a firm decision to apply for employment on October 18. I conclude that he made general inquiries about such employment on October 18, but did not make an oral application at that time.

Tibbs was a more believable witness than McHenry, and I credit his testimony that he did have a conversation with the fleet manager aboard the Delaware Getty. I have carefully considered Roane's testimony, but it is insufficient to rebut Tibbs, because of Roane's absences from the hallway, and his admission that Tibbs could have talked to McHenry.

Since Tibbs did ask McHenry about "the possibility of being hired," I conclude that he made an oral application for employment on October 19. McHenry replied that they were not hiring anybody affiliated with the ROU, but that Tibbs could make application in a nonunion capacity. Tibbs declined to do so. After talking with Penot, he submitted a written application which was received October 25.

I credit Andersen's rather than Penot's version of Andersen's written application. Since the latter was received by Crest on November 2, it is more likely that it was signed and mailed on October 28—according to Andersen—rather than on November 1—according to Penot. The latter had imperfect recall about the matter, and was mistaken. I conclude that he had mailed a copy of this letter for Tibbs—prepared on October 21—to the national office, and that Zotkowski use this draft as the letter for Andersen. I see nothing improbable in Zotkowski's taking the time to drive New Haven on a matter as important as this to the ROU. In any event, Andersen's written application was received by Respondent on November 2. On that date McHenry had not yet filled his complement of five radio officers. Nonetheless, Crest failed to hire Andersen or Tibbs.

Respondent's reassignment of Charouleau in December—on Lerro's resignation—its hiring of Margolis after Fitzgerald's disqualification, and the other subsequent hirings show clearly that Crest failed to hire Andersen and Tibbs at times when it needed radio officers, after they had submitted requests for employment. I reject McHenry's asserted reason for selecting Margolis rather than Andersen or Tibbs, since McHenry had not sent the latter application forms, had no way of knowing their qualifications, and was not a believable witness.

Respondent's arguments based on its alleged deference to Getty are not based on credible evidence. The position which it attributes to Getty concerning Tibbs is contradictory. If Getty was allowing Crest to hire only those employees whom it was dismissing, then why would it have objected to the hiring of Tibbs, who was only a "temporary" employee for a "limited time," to whom Getty owed "no obligation?" Why would Kevin Smart have told McHenry that Tibbs was "not available" to Crest—as McHenry asserts that he did—if Getty had no interest in Tibbs? The whole Getty rationale offered by McHenry is suspect because of the absence of Tibbs' name from the hiring list, the inconsistencies in Smart's position as asserted by McHenry, and Respondent's failure to call Smart as a witness.

As for Andersen, he did work for Getty after the sale of the New York Getty. According to Penot, the fact that all the Getty ships were for sale was common knowledge in the fall of 1982. They had all been sold by April 1983, and Andersen was no longer working for

Getty. The date of Brannick's hiring is not entirely clear from the record—McHenry testified on June 8, 1983, that it had taken place "just recently." I infer that Respondent hired Brannick about the time that Andersen's employment with Getty terminated, or thereafter, and at a time when Respondent continued to fail to respond to Andersen's employment application.

D. Legal Analysis

The credited evidence thus establishes that McHenry asked Andersen whether he was a member of the ROU. This constitutes unlawful interrogation under current Board law. When Andersen replied affirmatively, McHenry said that he could not discuss employment with him because of Crest's opposition to "national unions," and Andersen's membership in the ROU. This statement also was violative of Section 8(a)(1). McHenry's statement that Respondent would scrap the vessels if its employees were represented by national unions was clearly coercive under established law. Finally, McHenry's statement to Tibbs, that the Company would not be hiring any union personnel, was also violative of the Act.

McHenry's statements evidence Respondent's animus against the Radio Officers' Union as a "national union," and tend to show that membership of Andersen and Tibbs in the Union was a motivating factor in Respondent's refusal to hire them. McHenry needed radio officers badly, but did not call the ROU hiring hall. He was working for a company with a "different philosophy." When Tibbs made an oral application for employment on October 19, McHenry said that he could only apply in a nonunion capacity. Subsequently, when the written applications from both Tibbs and Andersen were received, McHenry did not even bother to respond, because he considered ROU's request for recognition and bargaining to be a "threatening" communication. Instead of sending employment application forms to Andersen and Tibbs, McHenry turned the matter over to Respondent's legal staff, pursuant to "higher authority."

Respondent argues that its employment of Charouleau shows that it was not against the ROU, and that Andersen's and Tibbs' membership had no bearing on its refusal to hire them. This argument rests on factual assumptions of questionable validity. The only evidence that Charouleau was a member of the ROU consists of McHenry's testimony about statements supposedly made to him by Charouleau's wife concerning her husband's employment by Delta, and McHenry's alleged knowledge of the union status of Delta employees from reading a shipping publication. The only document in evidence, however—Charouleau's employment application—does not list Delta as one of his prior employers. This fact casts doubt on the testimony of McHenry, an unreliable witness at best. Further, it is not clear that McHenry had any conversation whatever with Charouleau until after the time that the fleet manager had failed to hire Andersen and Tibbs. Even if Respondent did hire Charouleau knowing that he was a member of the ROU, this fact is undercut by McHenry's statements to Andersen, including the interrogation about the latter's union status, plus McHenry's statement to Tibbs that Respond-

ent was not hiring union personnel. *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134 (1st Cir. 1981), *enfg.* as modified 252 NLRB 1206 (1980). I therefore conclude that the General Counsel has established a strong *prima facie* case.

The next issue concerns the employer's burden of proof once the General Counsel has established a *prima facie* case of a discriminatory refusal to hire. In the instance of a *prima facie* case of a discriminatory discharge, the employer's burden is to establish that the employee would have been fired, for permissible reasons, even if he had not been engaged in protected activities. *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983); *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Where the General Counsel's *prima facie* case establishes a discriminatory refusal to hire, the employer's burden is to establish that its failure to hire the applicant was for reasons apart from the protected activities which support the *prima facie* case. *C & R Coal Co.*, 266 NLRB 208, 215 (1983).

I conclude that Respondent has not met this burden. Its principal argument—that it failed to hire Andersen or Tibbs because it had already hired a full complement of radio officers—is not supported by credible evidence.

Respondent's professed policy of honoring Getty's asserted request—that Respondent fail to employ Getty's permanent officers—is obviously pretextual as regards Tibbs, since he was not a permanent officer, and did not work for Getty after the Delaware Getty was sold on November 1.

Although Andersen was a "permanent" Getty officer, the Getty ships were up for sale in the fall of 1982, a fact which was commonly known, and had been sold by April 1983. Andersen's employment by Getty ended at that time. Nonetheless, Respondent hired another radio officer about that time or thereafter, and failed to respond to Andersen's employment application. I conclude that it was the strength of Respondent's animus against the ROU, rather than courtesy to Getty, which caused it to refuse to hire Andersen. There is no valid reason why Respondent's alleged deference to Getty should have continued after Andersen was no longer employed by Getty.

Since Respondent's asserted reasons for its failure to hire Andersen and Tibbs are invalid, it has not rebutted the General Counsel's *prima facie* case. Accordingly, I find that Respondent refused to employ Andersen and Tibbs because of their membership in the Radio Officers Union, in violation of Section 8(a)(3) and (1) of the Act.⁵

Tibbs made an oral application for employment on October 19, 1982. McHenry's statement that he could apply in a nonunion capacity constituted a denial of the application. This was followed by a written application received October 25. However, Respondent was only making oral commitments to hire as of November 1, when it acquired the ships from Getty. Accordingly, on October 19 it committed an unlawful refusal to hire

⁵ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Wyman-Gordon Co.*, *supra*; *C & R Coal Co.*, *supra*.

Tibbs to be effective November 1, 1982. With respect to Andersen, Respondent's unlawful refusal to hire took place on November 2, 1982, when it received his written application.

In accordance with my findings above and the entire record, I make the following

CONCLUSIONS OF LAW

1. Crest Tankers, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Radio Officers Union, District No. 3, NMEBA, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Asking an applicant for employment whether he was a member of the Union.

(b) Telling an applicant for employment that employment could not be discussed with him because he was a member of the Union.

(c) Telling an applicant for employment that Respondent would scrap its vessel if its employees were represented by a national union.

(d) Telling an applicant for employment that Respondent would not be hiring any union personnel.

4. By refusing to employ John W. Tibbs as a radio officer effective November 1, 1982, and by refusing to employ Frederick G. Andersen as a radio officer on November 2, 1982, because of their membership in the Radio Officers Union, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes of the Act.

It having been found that Respondent discriminatorily refused to hire as radio officers John W. Tibbs effective November 1, 1982, and Frederick G. Andersen on November 2, 1982, it is recommended that Respondent be ordered to offer each of them an immediate position as radio officer aboard one of its ships, or, if no such job is available a substantially equivalent job, discharging if necessary any employee hired to fill said position, and to make each of them whole for any loss of earnings he may have suffered by reason of Respondent's unlawful refusal to hire him, by paying him a sum of money equal to the amount he would have earned from the date of Respondent's unlawful refusal to hire him to the date of an offer of employment, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F.*

W. Woolworth Co., 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).⁶

I shall also recommend that Respondent be required to post appropriate notices.

On the foregoing findings of fact and conclusions of law and on the entire record, I recommend the following⁷

ORDER

The Respondent, Crest Tankers, Inc., Clayton, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or otherwise discriminating against applicants for employment because of their membership in or activities on behalf of Radio Officers Union District No. 3, NMEBA, AFL-CIO, or any other labor organization.

(b) Asking applicants for employment whether they are members of the Radio Officers Union, or any other labor organization.

(c) Telling applicants for employment that employment cannot be discussed with them, or that they cannot be employed, because they are members of a union.

(d) Telling applicants for employment that Respondent will scrap its ships if its employees become represented by national unions.

(e) Telling applicants for employment that Respondent will not hire any union employees.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Offer John W. Tibbs and Frederick G. Andersen immediate positions as radio officers aboard its ships or, if such positions do not exist, substantially equivalent positions, discharging if necessary any employees hired in their stead on or after November 1, 1982, in the case of Tibbs, and November 2, 1982, in the case of Andersen, and make them whole for any loss of earnings either of them may have suffered by reason of Respondent's discrimination against him, in the manner described in the section of this decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities at Clayton, Missouri, and aboard each of its ships, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms

⁶ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the Na-

provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

national Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT ask applicants for employment whether they are members of the Radio Officers Union, District

No. 3, NMEBA, AFL-CIO, or any other labor organization.

WE WILL NOT tell applicants for employment that employment will not be discussed with them, or that they will not be employed, because they are members of the Union or any other labor organization.

WE WILL NOT tell applicants for employment that we will scrap our ships if our employees become represented by national unions.

WE WILL NOT tell applicants for employment that we will not hire any union personnel.

WE WILL NOT refuse to hire or otherwise discriminate against applicants for employment because of their membership in or activities on behalf of the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL offer John W. Tibbs and Frederick G. Andersen immediate positions as radio officers aboard our ships or, if any such positions do not exist, substantially equivalent positions, discharging if necessary any employees hired in their stead, and WE WILL make them whole, with interest, because of our unlawful refusal to hire them.

CREST TANKERS, INC.